Re-conceptualizing equality in the work place: a reading of the latest CJEU's opinions over the practice of veiling

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Abstract

This article analyses the definition of religion adopted by the Court of Justice of the European Union in its latest opinions concerning the wearing of the headscarf in the workplace. It argues that, by adopting a secular/liberal definition of religion and linking religious freedom to individual autonomy, the CJEU creates a fixed legal and religious subject who is free and at the same time compelled to experience religion in a particular way. This, in turn, has two important implications: first, it creates a problem of equality as it distinguishes between different equality grounds. Second, contrary to liberal claims to secure the plurality and respect of religious minorities, it opens the door to the exclusion of veiled Muslim women from the European labour market.

Keywords: headscarf in the workplace, religious and secular, equality, religious freedom

1. *Introduction*

The right to religious freedom, enshrined in the law and codified in national constitutions as well as in international treaties, is considered one of the most important achievements of secular/western/liberal democracies which should guarantee the free expression of religious difference and the peaceful coexistence of different religions. However, in recent years, the visibility of religious difference in secular/liberal Europe has been at the centre of many polemical debates concerning notions of democracy, secularism and freedom. This is clear in the case of Muslim religious symbols such as the female veil, which has been widely legally regulated in the public sphere: as a result, Muslim women's freedom has been severely limited, to the point that veiled women have been forbidden to

study, to stand in a court room, and even to walk in public. Many cases have been decided at the European Court of Human Rights (ECtHR), which has usually upheld national decisions over the visibility of the practice, leaving member states a wide discretion in deciding whether the manifestation of religious symbols in the public sphere is necessary to protect the rights and freedom of others, public order, and democratic values.

While the wearing of the veil has been widely debated at the ECtHR, only recently has it been discussed at the Court of Justice of the European Union (CJEU) which was called to give an opinion on two cases[1] regarding the application of EU Directive 2000/78 concerning the establishment of a general framework for equal treatment in employment and occupation. The CJEU's decisions have sparked a passionate debate in Europe for two main reasons: firstly, they concern the principle of non-discrimination in relation to the practice of veiling in the workplace, touching upon other important individual rights. Secondly, they have altered the complex balance between a company's private interests and individual rights, opening the door to the exclusion of many Muslim women from the European labour market.

In analysing the latest CJEU decisions, most scholars have focused on the principle of equality and non-discrimination in the workplace enshrined in Directive 2000/78. These studies, however, do not problematize the secular forms of power that have led to the exclusion of veiled Muslim women from the labour market. In other words, by focusing mainly on the principle of non-discrimination as neutral and gender-blind, scholarly analysis lacks a theoretical understanding of the implications of secular values in European and human rights law. This article addresses and explores this neglected issue in relation to the CJEU's rulings on the interpretation of Directive 2000/78 concerning the wearing of the headscarf in the workplace. It argues that by adopting a secular/liberal definition of religion and religious practices and by linking religious freedom to individual autonomy, the CJEU

[1] Case C-157/15 *Achbita, Centrum voor geliijkheid van kansen en voor racismebestrijding v G4S Secure* [2017] EU:C:203; Case C-188/15 *Bougnaoui and Association de defense des droits de l'homme (ADDH) v Micropole SA* [2017] EU:C:204.

creates a fixed legal and religious subject, a generic gender-neutral *homo religiosus* who is both free and at the same time compelled to experience religion in a particular way. This, in turn, has important implications when applied to Directive 2000/78. Firstly, it creates a problem in the area of equality as it inevitably distinguishes between different equality grounds, between different religions, and between believers and non-believers. Secondly, contrary to liberal claims to secure the plurality and respect of religious minorities, it opens the door to the exclusion of veiled Muslim women from the European labour market. In this sense, liberal secularism does not emerge as the mere separation of private and public, church and state, but as the re-configuration of religious practices and sensitivities in the secular private and public spheres. In other words, by defining the proper way to understand religion and the religious subject, secularism creates the problem of religious minorities instead of solving it.[2]

As I shall argue, although the CJEU seems to contradict previous legal decisions taken by the ECtHR concerning the wearing of the veil in the workplace,[3] it actually adopts the western/secular and gender-blind definition of religion which is based on the binary distinction between *forum internum* and *forum externum*, faith and its manifestation, public and private. A close analysis of the CJEU's decisions over the practice of veiling reveals that religion, unlike sex, ethnicity, and skin colour, which are 'visible' differences, is seen as a private matter, something that can be chosen, hidden, or separated from the subject. The CJEU draws from a western Protestant view of religion as a personal and private relationship between God and the individual, neglecting not only different ways of experiencing religion, but also the complex interrelation between religion and gender.

I argue that, by defining religion as something private, the CJEU also defines the subject to be protected: a gender-neutral *homo religiosus* who is able to separate its internal from its external self, as revealed in the distinction made by article 9 ('Freedom of religion') of the European Convention of

[2] Saba Mahmood, *Religious difference in a secular age: A minority report* (Princeton University Press 2015).
[3] *Ewida and Others v. The United Kingdom* [2013] ECHR App. nos. 48420/10, 59842/10, 51671/10 and 36516/10.

Human Rights between faith and its manifestation. The separation between *forum internum* and *forum externum* encoded in the law shows that article 9 does not protect all religious individuals, just those who are able to (autonomously) hold a belief and to express this belief in a specific way. The CJEU's individualistic approach, mirrored in the distinction made by article 9 between faith and its manifestation, leads to a further paradox of European law, namely, the equality between religious and non-religious worldviews: the application of different equality grounds in the area of employment leads, in turn, to a re-conceptualization of the notion of equality. This re-conceptualization has been applied by widening the application of article 16 of the Charter of Fundamental Rights of the European Union (CFREU) concerning the rights of employers to conduct a business; in the case, the CJEU ruled in favour of greatly limiting individual rights, without balancing employees' and employers' rights. By so doing, it opens the door to the exclusion of veiled Muslim women from the European labour market. This exclusion, I argue, depends upon a prior (western/secular) normative understanding of what religion is and how the 'modern' legal and religious subject should experience its religious life. The imposition of a specific form of subjectivity reveals that secularism, which has become synonymous with neutrality and modernity, articulates and defines specific forms of knowledge and emerges not as the mere separation between the private and the public, but as the re-configuration of religious sensitivities and religious practices in the secular space.[4] This re-configuration, however, shows all the paradoxes of secular/liberal law which, contrary to its foundational principles, on the one hand claims to safeguard minorities' rights while on the other it compels the subject to assimilate to the majority.

2. *Blurring the line between direct and indirect discrimination: the Achbita and Bouganoui cases*

Two recent CJEU opinions concerning the application of EU Directive 2000/78 on non-discrimination in the workplace regarding freedom of religion have sparked a passionate debate in Europe: *Achbita*

[4] Sab Mahmood 'Religious Reason and Secular Affect: An Incommensurable Divide?' in Talal Asad, Wendy Brown, Judith Butler, Saba Mahmood (eds) *Is Critique Secular? Blasphemy, Injury, and Free Speech* (University of California Press 2009).

and *Bouganoui* (2017).[5] In both cases, the CJEU has given great emphasis to Article 16 of the CFREU ('Freedom to conduct a business'), focusing on the possible existence of justifications for a direct or indirect discriminatory ban of religious symbols.

Ms Achbita had been employed on a permanent contract by G4S, a private company that provides reception services for customers in the private and public sectors. When she joined the company, an unwritten rule required employees not to wear visible signs of their political, philosophical or religious beliefs in the workplace. In April 2006, however, Ms Achbita informed G4S that she intended to wear an Islamic headscarf: despite the lack of a written rule in the company's policy, G4S forbade the claimant to wear the veil, asserting the importance of the company's image of neutrality. Ms. Achbita, unhappy with the company's prohibition, officially notified G4S of her intention to wear an Islamic veil at work on the 12th of May 2006. After a couple of weeks, G4S's board approved an amendment to the workplace regulations, adding that employees could not wear any political, philosophical or religious symbol. One day before the regulation came into force, on the 12th of June 2006, Ms Achbita was dismissed for not complying with the company's internal rules. She sued a claim to the Labour Court, in Belgium, for discrimination, as G4S has modified the company's regulation after her notification. The Labour Court, however, dismissed her claim, stating that G4S's new regulations did not amount to direct or indirect discrimination, nor to an infringement of her individual right of freedom of religion. Ms Achbita appealed to the Court of Cassation, which referred the following question to the CJEU:

"Should article 2 (2) (a) of Directive 2000/78 be interpreted as meaning that the prohibition on wearing, as a female Muslim, a headscarf at the workplace does not constitute direct discrimination where the employer's rule prohibits all employees from wearing outward signs of political, philosophical and religious beliefs at the workplace?".[6]

[5] *Achbita* and *Bougnoui* (n. 1).
[6] *Achbita*, (n. 1) para 21.

The CJEU gave a preliminary ruling concerning the interpretation of Council Directive 2000/78, which establishes a general framework for the equal treatment of employees "for combating discrimination on the ground of religion or belief, disability, age or sexual orientation as regards employment and occupation, with a view to putting into effect in the member states the principle of equal treatment".[7] The Court focused on the interpretation of article 2 (2) of the Directive which provides that

"a) direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation, on any of the grounds referred to article 1; b) indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons *having a particular religion* or belief, a particular disability, a particular age, or a particular sexual orientation at a particular disadvantage compared with other persons unless:…that provision, criterion or practice is objectively justified by a legitimated aim and the means of achieving that aim are appropriate and necessary."[8]

Drawing on article 2 (2) (a) of the Directive, the CJEU established that Ms Achbita was not the victim of direct discrimination, as the company's written rule requiring her not to wear any political, philosophical, or religious symbols applied to all employees, and not only to the claimant's garments.[9] Hence, while the Court recognized that the right of freedom of religion also includes the right to manifest a religious belief, it distinguished between situations in which a company imposes limitations on all its employees and the ones that target a particular religion, which would lead to a specific group of people receiving less favourable treatment. On the facts, since the regulation applied to all employees, the Court found that Ms Achbita was not a victim of direct discrimination based on her religious beliefs. It seems therefore that the Court did not consider the fact that the introduction of

[7] 'Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation', *Official Journal L 303 , 02/12/2000 P. 0016 – 0022,* Art. 1, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32000L0078:en:HTML
[8] *Italics added.*
[9] *Achbita,* (n. 1) Opinion of AG Kokott, para 48.

a regulation that prohibits the wearing of religious, political or philosophical symbols in the workplace came just after the claimant had notified G4S of her intention to wear an Islamic headscarf.

After establishing that Ms. Achbita had not been a victim of direct discrimination, the Court examined whether, based on Article 2 (2) (b) of Directive 2000/78, the claimant was a victim of indirect discrimination, as the company's rules could affect a specific group of believers (in this case 'female employees of Muslim faith').[10] However, due to the difficulty of establishing whether the claimant had been a victim of indirect discrimination, the CJEU left to the Belgian national courts the duty of determining whether the internal rule of a private company could cause a disadvantage to a person who carries a particular religious belief and whether discriminatory provisions could be justified by a legitimate aim. In essence, in the *Achbita* case, the CJEU has provided an elaboration on how to interpret the concept of indirect discrimination, but it has given a great flexibility to national courts on the application of the EU Directive. The CJEU concluded that even if indirect discrimination was established, it could be justified in light of Article 16 of the CFREU on 'freedom to conduct a business':[11] "an employer's wish to project an image of neutrality towards customers […] is, in principle, legitimate, notably where the employer involves in its pursuit of that aim only those workers who are required to come into contact with the employer's customers".[12] Hence, the CJEU accepted that prohibiting any religious, political or philosophical symbol was a legitimate aim for a company pursuing a policy of neutrality, given that the "policy is genuinely pursued in a consistent and systematic manner"[13] towards every employee. Thus, instead of considering whether Ms Achbita was a victim of indirect discrimination based on the fact that the company's policies had "put persons having a particular religious belief […] at a particular disadvantage compared with other persons",[14] the CJEU considered whether G4S's dress policy was appropriate and necessary to achieve the aim pursued[15] through an examination of the nature of Ms Achbita's work. The Court pointed out that the

[10] *Achbita*, (n. 1) para 57.
[11] *Ibid*, Opinion of AG Kokott, para 81.
[12] *Achbita*, (n. 1) para 38.
[13] *Ibid*, para 40.
[14] *Ibid.*
[15] *Ibid*, para 42.

claimant's dismissal was justified to achieve a legitimate aim, as the nature of her work implied direct contact with the public and G4S wanted to give an image of neutrality. In contrast with previous legal decisions,[16] the Court adopted a narrow view of the concept of necessity as the company's internal rules were not limited to 'workers who interact with customers'. Only at the end of the judgement did the Court refer to the possibility that G4S could accommodate the requirements of Ms Achbita by transferring her to a role that did not entail a relationship with customers and/or that the company's regulations could be applied only to employees that dealt directly with customers. Hence, while on the one hand the Court referred to art. 5 of the Directive 2000/78 which states that a reasonable accommodation can be achieved through mitigating policies that remove obstacles for the claimant's participation in employment, on the other it gave Belgian national courts the discretion to define whether G4S had violated the claimant's individual rights and/or whether the company was able to accommodate Ms Achbita's claim.

In the same year, 2017, the CJEU was called to express another opinion concerning the wearing of the veil in the workplace. In the case *Bougnaoui v Micropole*[17] the claimant, Ms Bougnaoui, met a representative of Micropole at a student fair in 2007 and in 2008 she started an internship in the company. During the internship she was wearing a bandana as Micropole informed her that the wearing of an Islamic headscarf might pose problems when dealing with customers. This, however, did not stop the company employing Ms Bougnaoui on a permanent contract. Almost one year later, on the 15th of May 2009, a customer complained that Ms Bougnaoui's headscarf had upset a number of his employees and asked Micropole to send someone without a veil, stating, 'No veil next time!' Immediately afterwards, in June 2009, Micropole asked Ms Bougnaoui to remove the veil but she refused, alleging that her garments did not interfere with her performance at work. As a result, Ms Bougnaoui was dismissed with a letter which stated, *inter alia*, that since the dismissal was to be

[16] In the *CHEZ* Case, which concerned discrimination based on ethnic origins, the CJEU stated that in cases of indirect discrimination it is not enough that the measures adopted are justified by a necessary mean to achieve an appropriate aim. Case C-83/14 *CHEZ Razpredelenie Bulgaria AD v Komisia za zashtita ot diskriminatsia* [2015] EU:C:480.

[17] *Bougnaoui* (n. 1).

attributed to her refusal to remove the veil, the company was entitled not to give her a notice period in which she would be remunerated. Ms Bougnaoui considered the dismissal an act of discrimination and sued Micropole. While the Labour Tribunal of Paris ordered Micropole to pay compensation to the claimant for the notice period, French judges established that Ms Bougnaoui was not a victim of discrimination as Micropole's aim to protect its image of neutrality was proportionate and necessary. Ms Bougnaoui, assisted by the *association de défense des droits de l'homme* (ADDH), an association supporting the individual's fundamental rights, appealed against the decision to the Court of Appeal of Paris, which upheld the ruling of the Labour Tribunal, adding that the claimant was imposing her religious beliefs on Micropole's customers without considering their feelings. Ms Bougnaoui appealed at the Court of Cassation, which referred the following question to the CJEU for a preliminary ruling:

"Must article 4 (1) of Directive 2000/78 be interpreted as meaning that the wish of a customer of an information technology consulting company no longer to have the information technology services of that company provided by an employee, a design engineer, wearing an Islamic headscarf, is a genuine and determining occupational requirement, by reason of the nature of the particular occupational activities concerned or of the context in which that are carried out?"[18]

The CJEU found that Ms Bougnaoui had worn the veil for years before the customer's complaint; that there were no written or unwritten company rules; and that the customer's objection could be understood as pointing directly to female Muslim religious symbols ('No veil next time!') and not to religious or political symbols in a general sense. Therefore, the CJEU established that Ms Bougnaoui was a victim of direct discrimination and tried to understand whether the employer could rely upon the exceptions made by article 4 (1) to justify her dismissal, focusing on the definition of 'occupational requirement'. Based on the CJEU, an 'occupational requirement' is one that "is objectively dictated by the nature of the occupational activities concerned or of the context in which they are carried out. It cannot, however, cover subjective considerations, such as the willingness of the

[18] *Ibid*, para 26.

employer to take account of the particular wishes of the customer".[19] Hence, the exceptions to 'genuine and determining occupational requirement' could not be applied based on the preference of one customer, although "what is proportionate may vary depending on the size of the undertaking concerned. The bigger the business, the more likely it will be to have resources allowing it to be flexible in terms of allocating its employees to the tasks required of them. Thus, an employer in a large undertaking can be expected to take greater steps to make a reasonable accommodation with his workforce than an employer in a small- or medium-sized one".[20] In line with this reasoning and drawing on the *Feryn* case,[21] in which an employer was accused of direct discrimination because he did not employ 'immigrants' based on his customers' preferences, the CJEU concluded that

"Article 4(1) of Council Directive 2000/78/EC […] must be interpreted as meaning that the willingness of an employer to take into account the wishes of a customer no longer to have the services of that employer provided by a worker wearing an Islamic headscarf cannot be considered a genuine and determining occupational requirement within the meaning of that provision".[22]

Through this reasoning, the CJEU avoided considering whether the claimant had been subjected to different treatment based on specific religious beliefs, preferring to focus on the 'occupational requirement' and the fact that Micropole did not have a written policy that forbade the manifestation of political, philosophical or religious beliefs.

Although the *Achbita* and *Bougnaoui* opinions had different outcomes, what is of particular interest is the great importance given to Article 16 of the CFREU at the expense of the claimants' individual rights. Those opinions also reveal an intrinsic contradiction: in the *Achbita* case, it is difficult to understand how the wearing of a Muslim veil could undermine the image of the company's neutrality. G4S, with its new dress policy, had anticipated a possible problem with customers who might feel offended by the manifestation of (Muslim) religious beliefs. On the other hand, Micropole seems to

[19] *Ibid*, para 40.
[20] *ibid*, Opinion of AG Sharpston, para 125.
[21] C- 54-07 *Feryn v Centrum voor gelijkheid van kansen en voor racismebestrijding* [2008].
[22] *ibid*, para 42.

have been more open to religious differences as it dismissed Ms Bougnaoui only when there was an objective problem with a customer, although it clearly amounts to direct discrimination. Henceforth, while customers' preferences would amount to direct discrimination under article 4 (1), they could be justified as indirect discrimination under article 2 (2) (b). Although the cases were decided by focusing on different articles of Directive 2000/78, they mirror a general European trend that privileges leaving a large degree of discretion to national courts in relation to the manifestation of religious symbols. The risk is that these decisions will open the door for private companies to introduce dress code regulation in mass, implicitly discriminating against certain religions for whom the wearing of religious symbols is an integral part of the individual.

3. (Re) defining religious diversity

Based on various EU Treaties, the CJEU abides by the Charter of Fundamental Rights of the European Union, the European Convention on Human Rights (along with the ECtHR's decisions) and a wide range of EU laws that go beyond human rights issues as the final authority of EU legislation. Article 1 of Directive 2000/78 does not include a definition of religion: however, the CJEU has adopted the definition of religion enclosed in article 9 of the European Convention on Human Rights and article 10 (1) of the CFREU.[23] In both articles the term religion includes freedom of belief and freedom to manifest one's belief: hence, the reference to freedom of religion in article 1 of Directive 2000/78 covers both the *forum internum* and the *forum externum*. In fact, according to the ECtHR, religious freedom is not limited to belief but extends to its manifestations and is "one of the foundations of a democratic society".[24] Article 9 (1) of the Convention provides that

[23] *Achbita*, (n. 1), para 49.
[24] *Kokkinakis v. Greece* [1993] ECHR App. no. 14307/88. para 31.

"Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance".

However, not every act based on religious belief is protected by article 9: in the ECtHR's decisions, the term *practice* enclosed in the article "does not cover each act which is motivated or influenced by a religion or belief" but only a "normal and recognized manifestation" of religion or belief that "actually express[es] the belief concerned".[25] For this reason, article 9 (2) includes certain limitations to the manifestation of religious beliefs, providing that

"[the] freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others".

Thus, although the ECtHR has never clearly defined religion,[26] leaving this duty to European member states, Article 9 clearly establishes a distinction between the right to hold a belief and the right to manifest a belief, *forum internum* and *forum externum*; whereas the first is protected by the law, the latter is subject to limitations. The distinction between 'belief' and 'manifestation' made by Article 9, which mirrors the secular division between public and private, has received little attention from jurists, as it is taken as necessary in the legal reasoning.[27] The idea that religion necessitates a separation between what is observable and what does not fit with the liberal separation between the public and the private divide is an important feature of the ECtHR and CJEU rulings over the practice of veiling.

The distinction between *forum internum* and *forum externum* enshrined in Article 9, however, encodes problematic assumptions about religion and religious practices as well as the role of the law in regulating religious symbols in the public and private spheres, as it discloses a specific secular

[25] *Arrowsmith v the United Kingdom* [1978] ECHR App. n. 7050/75, 19-20.
[26] Carolyn Evans, *Freedom of Religion under the European Convention on Human Rights*, (Vol. 1 Oxford University Press, 2001).
[27] Peter Cumper & Tom Lewis "Taking Religion Seriously"? Human Rights and Hijab in Europe—Some Problems of Adjudication' [2008] *Journal of Law and Religion*. 24 599.

definition of religion. In fact, "religion in modernity indicates a universal genus of which the various religions are species: each religion comes to be demarcated by a system of propositions; religion is identified with an essentially interior, private impulse; and religion comes to be seen as essentially distinct from secular pursuits such as politics, economics, and the like".[28] Likewise, the distinction between *forum internum* and *forum externum* made by Article 9 presupposes a religious individual whose faith is a simple private matter, distinguishable from its manifestations (such as symbols, rituals, etc.). In other words, "a secular person is someone whose affective-gestural repertoires express a negative relation to forms of embodiment historically associated with (but not limited to) theistic religion".[29]

This is what transpires from different cases concerning religious freedom decided at the ECtHR as well as at the CJEU, in which religion is understood as mere individual, voluntary, private, intellectual conviction rather than something constitutive of the individual.[30] As a matter of fact, in the *Achbita* case, AG Kokott clearly states that "the practice of religion is not so much an unalterable fact as an aspect of an individual's private life, and one, moreover, over which the employees concerned can choose to exert an influence […] an employee may be expected to moderate the exercise of his religion in the workplace".[31] Thus, based on Kokott's reasoning, while gender, race, ethnicity and other individual characteristics are not chosen, religion is seen as a personal choice: in this way, Kokott presupposes an individual able to separate its religious beliefs from their manifestation, its internal from its external self. It follows that Ms Achbita 'chose' to discriminate herself by choosing to manifest her religion.

However, the essentialization and universalization of the concept of 'religion' as something private, along with the secular separation between faith and its manifestation, not only ignores the specific

[28] Peter Harrison *Religion' and the Religions in the English Enlightenment* (Cambridge University Press, 2002).
[29] Hirschkind (n. 49) 638.
[30] The essentialization of the concept of religion operated by the ECtHR should not surprise as western and human rights law promote abstract reasoning. In fact, the act of categorizing always involves a certain level of abstraction from one context to its application into another which results in a high level of uncertainty. Roger Trigg. *Religion in Public Life: Must Faith Be Privatized?: Must Faith Be Privatized?* (OUP Oxford 2007).
[31] *Achbita*, (n. 1), 213.

materialities of different religions, but it also excludes different subjectivities. In fact, for many Muslims religion is not a simple private intellectual conviction, but a relationship created through practices: Asad notes that the Arabic term *Iman* (faith) "is not a singular act that one performs naked before God. It is the virtue of faithfulness toward God, an unquestioning habit of obedience that God requires of those faithful to him, a disposition that has to be cultivated like any other, and which links one through mutual responsibility and trust to others who are faithful".[32] Similarly, Mahmood's study of 'pious women' highlights that non-liberal traditions have developed different understandings of religion and bodily practices: if, on the one hand, secular rationality defines religion (and religious signs/practices) as a matter of personal choice, then on the other, 'pietist women' disclose a performative/affective understanding of (religious) bodily practices.[33] She argues that "it is through repeated bodily acts that one trains one's memory, desire, and intellect to behave according to established standards of conduct".[34] In fact, for women of the piety movement, repeated bodily acts such as praying or wearing the veil become indispensable for acquiring specific values considered necessary attributes of the self. In essence, her study reveals that for many Muslim believers Islam is not simply a set of commandments based on religious belief, as in western secular thought, but a way to live and inhabit the world, bodily and ethically: as their aim is to follow the exemplar of the Prophet, a "Muslim's relationship to Mohammad is predicated not so much upon a communicative or representational model as an assimilative one".[35] The Aristotelian term *schesis*, which is defined as the way in which something relates to something else, can capture this sense of pluralistic embodiment and inhabitation (or intimacy) which is experienced differently by Muslim believers throughout the world: "such an inhabitation of the model (as the term *schesis* suggests) is the result of a labor of love in which one is bound to the authorial figure through a sense of intimacy and desire".[36] Thus, Muslims' love for the Prophet is mirrored in their wish to imitate his behaviour and way of life,

[32] Talal Asad, "Where are the Margins of the State?" in Veena Das, Poole D. (eds.) *Anthropology in the Margins of the State* (Oxford University Press, 2004) 218-19.
[33] Saba Mahmood. *Politics of Piety: The Islamic Revival and the Feminist Subject (*Princeton University Press, 2005).
[34] *Ibid*, 157.
[35] Mahmood, *Religious Reason* (n. 4). 487.
[36] *Ibid*, 848.

"not as a commandment but as virtues where one wants to ingest, as it were, the Prophet's personal into oneself".[37]

Based on these studies, it is clear that the ECtHR and the CJEU, by defining religion as a private matter, privilege a certain (secular/western) way to live and experience religion at the expense of others. The separation made by Article 9 between faith and its manifestation creates not only an understanding of how private and public life should be lived and experienced, but also a specific imagination which mediates people's identity in the 'modern' world.[38] This is the why the ECtHR tends to protect forms of religion that are compatible with western/secular/liberal sensitivities while excluding others: the women's headscarf represents a threat to secular sensitivities exactly because it proposes an idea of religion that does not conform to western secularity. This is clear in the comparison with the *Eweida* case[39] decided at the ECtHR, concerning British Airways' refusal to allow an employee to wear a cross during work time. While Ms Eweida presented her wish to wear the cross as a *personal choice*, rather than a religious requirement, the ECtHR, departing from previous juridical decisions concerning the wearing of religious symbols in which the Court stated that the manifestation should be one of the "normal and recognized manifestations" of religion or belief that "express the belief concerned",[40] established that there was no need for the claimant to demonstrate "that she acted in fulfilment of a duty mandated by the religion in question": in fact, for the Court, it was enough to show the existence of a "sufficiently close and direct nexus between the act and the underlying belief".[41] In finding a breach of Eweida's fundamental rights, the Strasbourg Court accused the UK of failing to balance Ms Eweida's individual rights with the right of the company to pursue its business and of merely focusing on the possible existence of discrimination in the work place. The ECtHR concluded that

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[37] Saba Mahmood 'Agency, Performativity, and the Feminist Subject' in Sjorup L and Christensen H. (eds) *Pieties and Gender* (Brill, 2009) 75-6.

[38] Talal Asad, *Formations of the Secular: Christianity, Islam, Modernity* (Stanford University Press, 2003); William Cavanaugh, *The Myth of Religious Violence: Secular Ideology and the Roots of Modern Conflict* (OUP, 2009).

[39] *Ewida and Others v. The United Kingdom* (n. 3).

[40] *Arrowsmith v the United Kingdom* (n. 25) 5.

[41] *Eweida*, (n. 3), para 52.

"where an individual complains of a restriction on freedom of religion in the workplace, rather than holding that the possibility of changing job would negate any interference with the right, the better approach would be to weigh that possibility in the overall balance when considering whether or not the restriction was proportionate".[42]

Conversely, in *Achbita* and *Bougnaoui*, the CJEU did not balance the need of the company to demonstrate neutrality with the claimants' fundamental rights. The Court did not even explore different ways for companies to maintain a policy of neutrality while mitigating the effects on employees' fundamental rights (for example, by asking them to wear a veil in the company's colour): it merely suggested that companies could offer possible redeployment. While this reasoning sits uneasily with the ECtHR's decision in *Eweida*, the CJEU seems to align with a previous ECtHR decision concerning the wearing of the veil in the case *Ebrahimian v France* (2015),[43] in which a social worker was dismissed from a public hospital, in the name of French secular values, because she was veiled.[44] In the case, the ECtHR noted that the manifestation of ostentatious religious symbols was incompatible with the neutrality required of public officials, who should observe and uphold the principle of secularism based on Article 1 of the French Constitution. However, while Ms Ebrahimian was working in a public institution, Ms Achbita and Ms Bougnaoui were employed in private companies that dealt mainly with the private sector. Hence the (supposed) defence of the neutrality of the public sphere cannot be employed for private companies, nor can it justify the exclusion of Muslim veiled women from the labour market without widening excessively the application of Article 16. What seems to equate the CJEU and ECtHR decisions is the level of discretion given to member states (through the application of the margin of appreciation) and private companies (through the importance given to Article 16) over the wearing of the headscarf. This discretion has been made possible by a specific definition of religion as a private matter which has blurred, and at the same time re-defined, the distinction between public and private, employees' and employers' rights.

[42] *Ibid*, para 83.
[43] *Ebrahimian v France* [2015] ECHR App. no. 64846/11.
[44] It is worth pointing out that the ECHR's approach on the neutrality of public institutions sits uneasily with the decision in the *Lautsi* case. *Lautsi v Italy* [2011] ECHR Application no. 30814/06.

Indeed, while the ECtHR has limited (Muslim) women's freedom based on the exceptions of Article 9 (2), the CJEU has banned the veil based on the principle of neutrality, which is not included in Article 9 (2), except implicitly as a synonym for secularism. In other words, the CJEU has upheld national decisions to ban the headscarf in the workplace without balancing the freedom to manifest one's religion and the 'necessity' of private companies to give a 'neutral' image. 'Neutrality', in the case, means that companies have the right to limit religious manifestations that are not in line with the Christian/secular understanding of religion. In the *Lautsi* case, Judge Power challenged the ECtHR's understanding of neutrality, stating that "neutrality requires a pluralist approach […] not a secularist one. It encourages respect for all world views rather than a preference for one."[45] In view of this, 'neutrality' in the workplace should signify both equal treatment of all customers and the possibility of different people to work in the same place. In the case, however, it is clear that the CJEU has applied a secular/liberal definition of 'neutrality' which depends upon a prior normative understanding of what religion is and how the secular/western/liberal subject should experience its religious life, presupposing an individual able to separate its internal from its external self. AG Kokott's argument that, unlike sex or ethnicity, religion is a matter of personal choice and can therefore be relegated to a small private sphere is an example of the fact that the CJEU has used a secular definition of religion. However, by so doing, the ECtHR and the CJEU have not only excluded different concepts of religion, but they have also favoured those with no faith and many Christians who live and experience religion differently from individuals adhering to other religious creeds. In essence, by implying a separation between *forum internum* and *forum externum*, the Court has marginalized other faiths for whom religious symbols are an integral part of the subject's formation. Thus, the western/secular definition of religion is not a neutral position but, rather, a "normatively prescriptive model that favours certain forms of modern religion at the expense of others that are equally legitimate".[46]

[45] *Ibid* Concurring Opinion of Judge Power.
[46] Ozlem Denli, "Between Laicist State Ideology and Modern Public Religion: The Head-Cover Controversy in Contemporary Turkey", in Lindholm and others (eds.) *Facilitating Freedom of Religion or Belief: A Deskbook* (Martinus Nijhoff Publishers, 2004) 497.

What is missed, then, in the analysis of the latest CJEU ruling over the wearing of the headscarf in the workplace, is the way in which liberalism and secularism understand and define 'religion' and 'religious practices' in the modern world and how this understanding is encoded in the law. In my analysis, secularism emerges not merely as the separation between the private and the public, *forum internum* and *forum externum*, but as the re-configuration of religious sensitivities and religious practices in the secular public and private spheres.[47] In other words, secularism becomes the imposition of a specific form of subjectivity and emerges not only as a "constellation of institutions, ideas, and affective orientations that constitute an important dimension of what we call modernity, [but also as a] concept that brings together certain behaviours, knowledges, and sensibilities in modern life".[48] Thus, secularism, which has become synonymous with 'modernity' and 'neutrality', defines specific forms of knowledge and practices (religious and non-religious) and becomes the framework through which to read and understand the religious, political and ethical spheres of the Christian/secular/liberal subject.[49]

It follows that western and human rights law protects a specific Christian/secular/liberal individual whose secular practices and/or sensitivity "is one that depends on, one that cannot be abstracted from, the secularist narrative of the progressive replacement of religious error by secular reason – what Asad calls the 'triumphalist narrative of secularism'. A secular sensibility is one considered from the standpoint of its contribution to that progressive narrative".[50] In essence, by introducing a secularized concept of religion and religious practices, those decisions reveal that western law protects a specific Christian/secular/liberal citizen, a gender-neutral *homo religious*, whose speech and behaviour incorporates the western/liberal categories of religious and secular. Hence, in the West, the subject of law has the autonomy to express her/his identity only when those identities can be assimilated into liberal secular sensitivities. Therefore, although human rights law claims to redeem humanity through the force of the law and EU Directive 2000/78 to achieve equality and non-discrimination in the

[47] Mahmood, (n. 4).
[48] Asad, *Formation of the Secular,* (n 38) 25.
[49] Charles Hirschkind 'Religious Difference and Democratic Pluralism: Some Recent Debates and Frameworks' [2011] *Temenos*. 44 125.
[50] Charles Hirschkind 'Is There a Secular Body?' [2011]*Cultural Anthropology*. 23 (2011) 641-2.

workplace, they actually act to exacerbate cultural and religious differences in the name of a fixed and monolithic Christian/secular/liberal law and religious subject and to discriminate against religious minorities in Europe. This emerges as a paradox of European secular liberal societies which have established a legal framework that should protect the plurality of contemporary western society.

4. Conclusion

Religious freedom is considered one of the most important achievements of the secular-liberal polity, giving individuals the right to choose a religious belief without any interference from the state, the church or other institutions, creating, in this way, a tolerant environment in which personal civil, legal and economic rights remain unaffected by one's religious beliefs.[51] However, as is clear from the latest CJEU decisions over the wearing of the headscarf in the workplace, by giving a specific secular/liberal definition of religion and religious practices, European law operates a differentiation between equality grounds as well as religions. This secular/liberal approach taken by the CJEU, as I have argued, reveals a particular preoccupation when applied in the interpretation of the Employment Equality Directive 2000/78, as it opens the door to a denial of the economic, civil, and legal rights of many veiled Muslim women in Europe.

In the *Achbita* and *Bouganoui* cases, the CJEU has adopted Strasbourg's approach in defining religion as covering both the *forum internum* and *forum externum*, while, at the same time, it has distinguished between the two spheres: while the first is protected, the latter is subject to limitations made by Article 9 (2). However, European rulings over the practice of veiling present a certain confusion concerning the protection of the *forum internum*. In particular, it is unclear whether the law protects religious beliefs that have been autonomously chosen by the individual, or religious beliefs that are un-chosen.

This confusion is mirrored in the *Bougnaoui* and *Achbita* case. In fact, while in *Bougnaoui* AG Sharpston discloses an understanding of religion as something un-chosen, in Achbita religion is

[51] Mahmood, Re*ligious difference* (n.2).

understood as mere belief, an idea, a matter of personal choice. In the *Bougnaoui* case, AG Sharpston states that "to someone who is an observant member of a faith, religious identity is an integral part of that person's very being […] it would be entirely wrong to suppose that, whereas one's sex and skin colour accompany one everywhere, somehow one's religion does not".[52] By contrast, AG Kokott, in *Achbita,* argues that "the practice of religion is not so much an unalterable fact as an aspect of an individual's private life, and one, moreover, over which the employees concerned can choose to exert an influence […] an employee may be expected to moderate the exercise of his religion in the workplace".[53] Despite this (apparent) divergence, in both cases the AGs link religious liberty to individual autonomy, reinforcing the liberal concept of religion as something autonomously chosen by the individual. AG Sharpston links autonomy and religious freedom by drawing on AG Maduro in *Colman*[54] and defines beliefs as detached from communal rituals and symbologies, reinforcing the liberal position taken by diverse scholars who place great emphasis on individual autonomy in the establishment of minority religious rights.[55] Sharpston's reasoning seems to recall Kymlicka[56] for whom the meaning of individual autonomy lies in the individual's capacity to maintain its cultural institutions and way of life: this inevitably expands the range of options between which an individual can choose by exercising its autonomy. This reasoning is mirrored also in the *Achbita* case in which the CJEU's understanding of religious freedom as a means to protect the autonomy of an individual's beliefs inevitably leads to the idea that it is not religion *per se*, but the ability of the individual to 'manifest' a religious belief in a specific way that is at stake.[57]

The task of the Court is therefore not so much to identify what religion is and protect it, but to ensure that a specific liberal/secular way of understanding and experiencing religion is protected by Article 9.

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[52] *Bougnaoui* (n. 1) 118.
[53] *Achbita* (n. 1) 116.
[54] Case C-303/06 *Coleman S. v Attridge Law and Steve* [2008] EU.
[55] Will Kymlicka, *Multicultural citizenship: A liberal theory of minority rights* (Clarendon Press 1995); Charles McAdams,'Charles Taylor, Multiculturalism and "The Politics Of Recognition"' [2006] *Vera Lex* 7 (1/2) 127-139.
[56] *Ibid.*
[57] Ronan McCrea, 'Singing from the Same Hymn Sheet? What the Differences between the Strasbourg and Luxembourg Courts Tell Us about Religious Freedom, Non-Discrimination, and the Secular State' [2016] *Oxford Journal of Law and Religion*, 5.2: 183-210.

Hence what is at stake is not merely the distinction between *forum internum* and *forum externum*, belief and manifestation, but two different concepts of religion: one is linked to individual consciousness and autonomy, while the other refers to religion as a discursive tradition which informs the collective life of a community. The CJEU's definition of the *forum internum* leads to a specific concept of how private and collective religious identities are lived and experienced: "thus, even a highly individualized and privatized conception of religion (such as Protestantism) entails a substantive and prescriptive notion of the self, sociality and collectivity that remains unaccounted for the right to religious liberty".[58] Hence, the model of religious tolerance based on the separation between the church and the state, the private and the public, which mirrors the model adopted by the courts when dealing with ethno-cultural and religious differences,[59] reveals an intrinsic contradiction: while, on the one hand, European states and private companies do not oppose the freedom of people to express their religion, on the other, they are increasingly asking individuals to reduce their freedom to a very restricted private sphere; the home and the church. The latest CJEU decisions disclose that Article 9 and, more widely, European law protects a specific law and religious subject: an autonomous, abstract, gender-neutral individual, a monolithic *homo religious,* disentangled from its gender, ethnicity and social class, who is able to separate its internal from its external being, the *forum internum* from *forum externum*.

The CJEU's definition of religion and the religious subject has important implications when applied in the interpretation of Directive 2000/78. Firstly, it presents a problem in the area of equality, namely, the equality between religious and non-religious individuals. Dworkin[60] and other scholars[61] have pointed out that the principle of religious liberty protects religious beliefs alone, raising issues of discrimination between religious and non-religious individuals. Secondly, the CJEU's individualistic approach underpins different concepts of religion and religious practices and, by so doing, leads to the exclusion of veiled Muslim women on different grounds. While, based on the exceptions made by

[58] Mahmood, *Religious Difference* (n. 2) 166.
[59] Kymlicka, *Multicultural citizenship* (n. 55).
[60] Ronald Dworkin, *Religion without god* (Harvard University Press 2013).
[61] Micah Schwartzman, 'What if Religion is not Special?' [2012] *The University of Chicago Law Review* 1351-1427.

article 9 (2), the ECtHR has upheld national decisions to defend the secular character of the state by banning the veil from public places/offices, the CJEU has opened the door to a further limitation of individual rights in the workplace by encouraging employers to increasingly marginalize different religious identities in the name of the principle of neutrality. In the case, however, neutrality has signified the exclusion and invisibility of many Muslim women in Europe who already experience great discrimination in accessing the labour market. It seems that the CJEU's judges did not take into consideration that Muslim women experience more discrimination than western/Christian/white women in the workplace, as revealed by the latest statistics on Islamophobia in Europe. A report drafted by the 'European Network Against Racism' highlights that Muslim women are less likely than white/Christian women to find a job: 44% of employers declared that the wearing of the veil reduces the candidate's chance of getting a job while 50% of those interviewed felt that they had missed the chance of getting a proper position because they were veiled.[62] The report clearly states that "Muslim women face multiple discrimination when searching for employment, in career progression, and in gender-based pay equity. This multiple discrimination is a [combination] of gender-based, ethnic, and religious factors".[63] Hence, while many politicians such as the French presidential candidate Francois Fillon applauded the latest CJEU ruling as "fighting for women's rights and recognition in the workplace is an ongoing mission and this ruling should be seen very much as a blow for the movement as a whole",[64] it is clear that the CJEU rulings specifically affect veiled Muslim women who already face great discrimination in the workplace and also risk exclusion from the labour market.

Thus, the CJEU's decisions are not neutral, as they disclose an occidental, secular understanding of 'religion' and the religious subject. It is exactly the Christian/secular understanding of religion and the religious subject that allows the regulation of private (religious) sentiments in the public sphere to the

[62] Siobhan Fenton "British Muslim women face 'double bind' of gender and religious discrimination, report warns". *The Independent*, (2016) http://www.independent.co.uk/news/uk/home-news/british-muslim-women-face-double-bind-of-gender-and-religious-discrimination-report-warns-a7049031.html
[63] *Ibid.*
[64] Sheila Janmohamed "Hijab at work; EU court is authorising discrimination" (2017) *Al Jazeera*, http://www.aljazeera.com/indepth/opinion/2017/03/hijab-work-eu-court-authorising-discrimination-170316082810334.html

point that it limits employees' rights and many Muslim women's access to and participation in the European labour market. In my analysis, it is the lack of problematization of secular forms of power that allows the CJEU to introduce restrictions to personal freedoms, perceiving them not as a form of violence but as a safeguard of the 'neutrality' of private business.

It follows that the regulation of Muslim women's performative practices through the application of a specific secular/liberal concept of religion and religious practices indicates that secularism does not emerge as the mere separation between religion and politics, private and public, but as the re-configuration of religious sensitivities and religious practices in the secular sphere. Consequently, the protection afforded to religious minorities, a principle defined by the secular/Christian codification of religion and religious practices, creates the 'minority problem' instead of solving it.[65] In essence, "the liberal (political/constitutional) state does not so much eliminate religion from its operative rationality as relocate it from 'the sphere of public law to that of private law'".[66] Hence, to think about the 'religious' is also to 're-think' about the 'secular': "through a certain double movement secularism and Christianity have become productively fused, in a way that repeats the story of European exceptionality while inscribing the essential otherness of the Muslim populations within its borders".[67]

Therefore secular/liberalism, with its promise of political and civil equality, presents an intrinsic paradox: on the one hand it claims to free the individual from state intervention in matters of personal consciousness, while on the other it regulates the private life of the individual. In fact, if EU law is based on equality, democracy and pluralism, the CJEU should consider that religion is not always essentially the same and its definition depends on different cultures and historical periods. Although what (should) distinguish the liberal/secular project from dictatorial states is its promise of equality between citizens, regardless of their affiliation, the latest CJEU decisions show that equality remains a far-reaching goal in contemporary Europe: this, in turn, reveals that the secular/liberal polity increases

[65] Mahmood, *Religious Difference* (n. 2).
[66] *Ibid*, 80.
[67] Hirschkind (n. 44) 125.

the precarious position of religious minorities as well as the conflict between majority and minority views. In fact, as I have argued, while on the one hand western law encodes majoritarian values, on the other it promises to be neutral. Hence, while secular/liberal law claims to solve is called upon solving a minority-majority conflict, in reality it creates it.[68]

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[68] Mahmood, *Religious Difference* (n. 2).

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